FOIL
FORUM OF INSURANCE LAWYERS
IRELAND

Informing Progress - Shaping the Future

FOIL UPDATE 2nd February 2021

Who are you calling a thief?

At this FOIL Ireland Learning Event, **Shane English**, BL gave a talk relating to what he described as 'general shoplifting type defamation claims'. The event was attended online by 129 delegates.

He opened by reminding delegates that these actions may only be brought in the Circuit Court (judge sitting alone), where the jurisdiction is up to €75,000 and there are therefore costs implications. In the High Court one or both parties may request a jury trial and these do arise occasionally but rarely get very far, as it is very difficult to reach the ceiling for damages in the lower court.

The limitation period in the Circuit Court is one year, with time starting to run from the moment the plaintiff knows they have been defamed by the particular shop or security company. There is a great deal of case law around the issue of time. *Desmond v The Sunday Times* confirms that the onus is on the plaintiff to bring an action as fast as possible, with a view to restoring his/her reputation. In reality, under the provisions of the Defamation Act 2009, the only way to achieve that is through damages. S38 of the Statute of Limitations does permit

IN BRIEF

What should retailers do to apprehend suspected shoplifters, without risking claims for defamation, if no goods have been stolen?

Shane English of counsel discusses how qualified privilege can found a successful defence if the correct procedures are followed.

a one-year extension of the limitation period, by application made within the overall two-year period. A number of these applications have been made but do not usually do very well, as the bar to extend is set very high. Mr English cited only one case (*O'Brien v O'Brien*) where an extension had been allowed, and that was a case involving two brothers involved in a Will Suit and where one was alleged to have defamed the other. Accordingly, extensions of time are extremely unlikely in the type of case with which this talk was concerned.

As cases must be commenced in the Circuit Court, costs and particularly fees are a major problem. This is primarily because the costs are much the same, irrespective of the level of damages awarded, which may be nominal only. The tendency is for this type of defamation case to involve relatively modest sums (with a range commonly between €4,000 and €10,000). Very few of these cases succeed but even with those that do, the level of damages is rarely higher than this.

This poses the question of what the defendant should do when faced with a potentially expensive claim from a costs point of view when the plaintiff is often impecunious. Large companies and insurers recognise that buying off these claims for modest damages and costs just leads to more of them. Defendant companies who have run all these cases have seen a reduction in numbers because solicitors have begun to realise that the claim will be defended and there may be nothing in it for them. It is, however, a major issue for smaller companies.

The cases are best categorised as 'slander' where there is little publication. Publication is a key ingredient but once the slanderous statement has been made to someone other than the plaintiff, damages may be awarded. The size of the 'audience' is likely to affect the level of damages.

These actions tend to involve small retailers, with pharmacies becoming a massive target. Here, the would-be plaintiff will pick up a small but high value item and secrete it in the hopes of being challenged before attempting to leave the premises. There are also cases where the shopper may have been absent minded and has not deliberately concealed an item. It is the cases where the plaintiff has 'sought' an action that are the most problematic. This is where they act as if they are going to steal an item but when challenged on leaving the premises, the item is not found on them. It is tempting for the shopkeeper to wonder whether it is worth defending any subsequent claim but Mr English took the view that it is.

A potential plaintiff's solicitor will want to know the type of shop involved; the systems in place; and were those systems operated negligently? There will be a major difference between a market stall holder and a major retailer with sophisticated CCTV systems. Where applicable, defendants must consider whether staff followed the correct procedures when a suspicious act occurred. The defendant's focus must be on how the member of staff acts when a challenge has been made but no stolen item is found. It is vital that the member of staff maintains the position that they had a bona fide reason for making the challenge. They should not 'row back' into a defensive position. If no bona fide belief had been formed, there will be no defence but if such a view was held the defence of qualified privilege may be run.

The defences are set out in the 2009 Act, which codifies the common law defences. S16 provides the defence of truth. This may be pleaded where despite being caught red handed, a plaintiff still brings an action for defamation. To plead this defence the defendant must be certain, as otherwise it may attract aggravated damages if the defence does not succeed. It is a difficult defence to run and has all sorts of other complicating factors, such as lowering the bar for a plaintiff looking to extend time beyond the one-year limitation period.

Qualified privilege is the main defence in this type of case. This is about reciprocal interests: the store owner/member of staff/security personnel have an interest in ensuring that goods are not stolen and the 'customer' must have an interest in what they have to say. Only (legal) malice can defeat that defence, e.g., challenging the customer over the tannoy system, rather than at the door of the premises. Great care must be taken in where and how the person is challenged. Ideally this should be after they have passed the last point at which they could have paid. As this will often be outside the shop, the approach should be as discrete as possible, with no aggression and with the allegation put as a matter of fact. i.e., 'I believe you have something in your bag for which you did not pay'. Even if this is overheard by others, the defence is available, provided the belief was genuine. This is an important training issue for staff.

There are two judgments of significance. The first is *McCormack v Olsthoorn (2004) IEHC 431*, which provides a comprehensive analysis of qualified privilege in this context. This was in the setting of a plant stall in a busy market. The defendant stopped the plaintiff, by putting his hand on his shoulder and alleged that he had stolen a plant from his stall. However, when the plaintiff pulled a plant from his bag, the defendant realised that the plant was not from his stall and immediately apologised. A Circuit Judge found in favour of the claimant both in defamation and assault. On appeal, it was held that this was a case of qualified privilege involving a small trader, for whom the goods were valuable. He had not had the time to consider the words that he should use, but he had not screamed and shouted and he did not have the means to check what had actually happened. At the moment of the challenge, he had a bona fide belief the goods had been stolen from his stall. It did not matter that he was wrong. The belief may be that held by of a member of staff or a security guard. (However, in *McCormack* the allegation of assault was upheld).

The second (unreported) case relates to larger stores. It also post-dates the 2009 Act. In *Holbrook v Dunnes Stores* a security officer thought that the plaintiffs had taken a slab of beer without paying for it. After a colleague had confirmed by viewing the CCTV footage that the plaintiffs had picked up the beer and had not been seen paying for it, the two security guards ran across the store's car park and challenged the plaintiffs at their car. This involved one of the security guards opening the passenger door, as some of the plaintiffs were already in the vehicle. They were accused of taking the slab of beer and were marched back to the store, whereupon one of the plaintiffs pointed to the slab of beer, which they had put down before the check out point.

Finding in favour of the defendant, the High Court Judge found that this case had to be considered in the context of how society now works. The security guards had not only followed the correct procedures within the store but after that had acted to prevent a theft. The security guards had acted reasonably, on the basis of reasonable belief, even if wrong.

These cases are therefore winnable. Judges recognise the problems facing retailers from theft. However, in the light of the award for assault in *McCormack,* physical contact must be avoided, save in rare cases where the individual has been caught red-handed and the Guards are on the way.

There are also claims made for false imprisonment although, in the main, these fail if a defence of qualified privilege succeeds. A claim might succeed if there was evidence of an unnecessarily heavy-handed attempt to restrain the suspect.

In rare cases, a declaration may be sought summarily under S28 of the 2009 Act but that rules out any claim in any court if it fails. As illustrated by *Lowry v Smith*, if a defendant can show that it has any defence, the action will fail. There was partial success in *Waters v Star Newspaper* but no

damages were awarded because the defamed plaintiff was in prison and had no reputation to lose. (The court ordered the defendant to publish a corrective statement). This section will therefore be used only by those with resources who wish simply to clear their name, without damages, or those who have been defamed but appreciate they will be awarded no damages because of their low reputational standing.

S22 of the 2009 Act allows the defendant to make an offer of amends. This will lead to a reduction in the damages awarded, if they cannot be agreed. However, the plaintiff is still entitled to a jury award if the claim goes to court for assessment: *White v Sunday World.* In the event of a jury award, the damages otherwise payable should be reduced substantially in the light of the offer of amends. In *Higgins v IAA*, the jury made an award and discounted it by 10% but on appeal the reduction was increased to nearer to 30% - 40%.

Q&A Session

Claims are brought on behalf of very young children and Mr English was concerned that any defendant would suggest that a very young child should be considered to be in a position to pay for goods and therefore be capable of theft. With older children, however (14/15) there is no difference from adult cases.

Defendants should be wary of citing past criminal activity unless able to produce the necessary evidence. The Guards are unlikely to assist in producing evidence of past convictions and failing to prove such allegations could lead to aggravated damages.

Where tags are left on, the plaintiff must prove negligence and loss. Defendants should always request detail of any alleged special damages. It makes no real difference to the defamation aspect of the case.

Where a plaintiff alleges defamation and personal injury, they must bring an action for defamation and tag on the personal injury claim.

On a broad-brush basis, additional damages for false imprisonment will be around one-third of those for defamation.

Best practice is probably NOT to allow members of staff to collect evidence on their own phones.

Where a disgruntled customer posts defamatory material about a retailer's employee on social media, the employer should work with the employee to write to the relevant platform to have the post taken down.

Mr English is in favour of the continuation of jury trials but believes that there is a movement to do away with them.